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George J. Weise,
Commissioner of Customs.

Approved: August 21, 1995.

Dennis M. O'Connell,
Acting Deputy Assistant Secretary of the
Treasury.

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SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

RIN 0960-AE06

Administrative Review Process, Testing Modifications to Prehearing Procedures and Decisions by Adjudication Officers

AGENCY: Social Security Administration
(SSA).

ACTION: Final rules.

SUMMARY: We are amending our rules to establish authority to test use of an adjudication officer who, under the *Plan for a New Disability Claim Process* approved by the Commissioner of Social Security in September 1994 (the disability redesign plan), would be the focal point for all prehearing activities when a request for a hearing before an administrative law judge (ALJ) is filed. The adjudication officer position is an integral part of the disability redesign plan. We expect that our tests of this position will provide us with sufficient information to determine the effect of the position on the hearing process. These final rules add two new sections setting out, for purposes of the tests we will conduct, the responsibilities of the adjudication officer in connection with a claim for Social Security or Supplemental Security Income (SSI) benefits based on disability. Unless specified, all other regulations related to our administrative review process and the disability determination process remain unchanged.

EFFECTIVE DATE: September 13, 1995.

FOR FURTHER INFORMATION CONTACT:
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SUPPLEMENTARY INFORMATION:

Background

The Social Security Administration (SSA) decides claims for Social Security benefits under title II of the Social Security Act (the Act) and for SSI benefits under title XVI of the Act in an

administrative review process that generally consists of four steps. Claimants who are not satisfied with the initial determination we make on a claim may request reconsideration. Claimants who are not satisfied with our reconsidered determination may request a hearing before an ALJ, and claimants who are dissatisfied with an ALJ's decision may request review by the Appeals Council. Claimants who have completed these steps and who are not satisfied with our final decision, may request judicial review of the decision in the Federal courts.

Generally, when a claim is filed for Social Security or SSI benefits based on disability, a State agency makes the initial and reconsideration disability determination for us. A hearing requested after we have made a reconsideration determination is held by an ALJ in one of the 132 hearing offices we have nationwide.

Applications for Social Security and SSI benefits based on disability have risen dramatically in recent years. The number of new disability claims SSA received in Fiscal Year (FY) 1994—3.56 million—represented a 40 percent increase over the number received in FY 1990—2.55 million. Requests for an ALJ hearing also have increased dramatically. In FY 1994, our hearing offices had almost 540,000 hearing receipts, and the overwhelming majority of these receipts were related to requests for a hearing filed by persons claiming disability benefits. In that year, the number of hearing receipts we received exceeded the number of receipts we received in FY 1990 by more than 70 percent. We expect hearing receipts to increase to more than 590,000 by the close of FY 1995.

Despite management initiatives that resulted in a record increase in ALJ productivity in FY 1994 and the hiring of more than 200 new ALJs and more than 650 new support staff in that year, the number of cases pending in our hearing offices has reached unprecedented levels—more than 480,000 at the end of FY 1994 and more than 554,000 at the end of July 1995.

In order to process this workload, the disability redesign plan contains other changes to the disability determination process by which SSA plans to decrease processing times while providing world-class service. For example, the disability redesign plan envisions a streamlined initial disability determination process which will result in more timely determinations and the elimination of the reconsideration step in the administrative review process for disability claims. We expect that one consequence of these initiatives will be

an increase in the number of requests for hearings filed over the next several years. In light of these growing workload expectations, and to process more efficiently the hearing requests now pending at our hearing offices, we are issuing these final rules establishing the authority to test having an adjudication officer conduct prehearing development and, if appropriate, issue a decision wholly favorable to the claimant.

We expect that use of an adjudication officer, as described in our disability redesign plan, will enable us to ensure development of a more complete record and to issue decisions in a more efficient manner when a request for a hearing has been filed. We anticipate that our tests of the adjudication officer position will provide us with information regarding the effect use of an adjudication officer has on the current hearing process, and how to best use an adjudication officer under the redesigned disability process. We will do this by testing the adjudication officer position alone and in combination with one or more of the tests we are conducting pursuant to the final rules "Testing Modifications to the Disability Determination Procedures," which were published in the **Federal Register** on April 24, 1995 (60 FR 20023) (to be codified at 20 CFR 404.906 and 416.1406).

We consider testing and subsequently implementing use of an adjudication officer to be a high agency priority. It is a complementary approach to the short-term disability initiatives we currently are undertaking. Our short-term initiatives are designed to process more efficiently pending requests for hearings and reduce the number of pending hearings to 375,000 at the end of calendar year 1996. One key short-term initiative is set out in the final regulations we published in the **Federal Register** on June 30, 1995 (60 FR 34126), which temporarily authorize attorney advisors in our Office of Hearings and Appeals (OHA) to conduct certain prehearing proceedings and, where appropriate, issue decisions which are wholly favorable to the claimant and any other party to the hearing. Our attorney advisor rules will no longer be effective on June 30, 1997, unless they are extended by the Commissioner of Social Security by publication of a final rule in the **Federal Register**. The principal aim of the final rules authorizing attorney advisors to conduct certain proceedings and issue wholly favorable decisions is to expedite decisions on pending requests for hearings. The use of an adjudication officer is focused on making better use

of existing resources, so that ongoing cases are processed more timely and in a more efficient manner. These final rules authorizing us to test use of an adjudication officer will allow us to test the effect of a process that we expect will allow us to better manage the hearing process in the years to come.

We find good cause for dispensing in this case with the 30-day delay in the effective date of a substantive rule provided for by 5 U.S.C. 553(d). As explained above and in the notice of proposed rulemaking (NPRM), the number of hearing requests pending at OHA has reached unprecedented levels, and the number of requests for hearings filed over the next several years is expected to continue to increase. In view of the number of pending and expected hearing requests, the beneficial effect we expect this rule to have on our ability to improve our service to claimants, and the importance we place on ensuring that we adjudicate claims timely and accurately, we find that it is in the public interest to make these final rules effective upon publication.

Prehearing Procedures Under the Disability Redesign Plan

On April 15, 1994, SSA published a notice in the **Federal Register** (59 FR 18188), setting out a proposal to reengineer the initial and administrative review process we use to determine an individual's entitlement to Social Security and SSI benefits based on disability. Comments on this comprehensive and far-reaching proposal were requested, and during the comment period that began on April 1, 1994, and ended on June 14, 1994, SSA received, from a broad spectrum of respondents, over 6,000 written responses and extensive oral comments. The commenters expressed their belief that improvements were needed to provide better service and to manage the claims process more effectively. While some concerns were expressed, the commenters praised SSA for taking on the task of redesigning the disability claim process.

On September 7, 1994, the Commissioner of Social Security accepted the revised disability redesign plan that was submitted for her approval on June 30, 1994, with the full understanding that some aspects of the proposal would require research and testing. The plan as approved by the Commissioner was published in the **Federal Register** on September 19, 1994 (59 FR 47887).

The plan anticipates a redesigned, two-step process for deciding Social Security and SSI claims based on disability. Under this process, the

claimant will receive an initial determination, and if the claimant is not satisfied with this determination he or she may request an ALJ hearing. When a hearing is requested in the redesigned process, the focal point for prehearing activities will be an adjudication officer who will work with, among others, claimants and their representatives. Adjudication officers will have authority to make decisions wholly favorable to the claimant after the hearing is requested but before it is held where such decisions are warranted by the evidence.

The adjudication officer, together with the claimant and his or her representative, will have responsibility for ensuring that claims coming before ALJs are fully developed. The procedures outlined in the disability redesign plan make the best use of the services of representatives by more clearly defining the responsibility of claimants and their representatives to submit evidence. In addition, we anticipate that the hearing process will function more efficiently under the disability redesign plan because the adjudication officer will conduct an informal conference with a claimant's representative to identify the issues in dispute and to prepare proposed written agreements for the approval of the ALJ regarding those issues which are not in dispute and those issues proposed for hearing. We would not ask a claimant who does not have a representative to limit issues prior to the hearing. However, if the claimant obtains representation after the adjudication officer concludes that the case is ready for a hearing, the ALJ will return the case to the adjudication officer who will conduct an informal conference with the claimant and his representative.

In these final rules we are adding new §§ 404.943 and 416.1443. These sections set out, for purposes of the tests we will conduct, the responsibilities of the adjudication officer when a request for an ALJ hearing is filed.

For many years, our hearing offices have productively used various forms of prehearing development. We have conducted tests of a standard prehearing development process under our existing regulatory authority. This experience has given us some information about the effect the establishment of an adjudication officer position may have on the administrative review process. However, as we believe that further information will allow us to better evaluate the effect the position may have on the administrative review process, we will begin testing use of the adjudication officer as soon as possible. The tests are intended to assess whether

the position meets the goals of the disability redesign process and whether it will have an effect on administrative and program expenditures. We also will manage closely the tests of the adjudication officer position to ensure that the procedures are consistently and effectively applied at all locations.

In accordance with the goals and directives of the National Performance Review's Reinventing Government Programs I and II, and our disability redesign plan, the role of the adjudication officer must be flexible to make the best use of our available program resources and also be consistent with providing world-class service to our customers. Accordingly, under these final rules, the adjudication officer may either be a qualified employee of SSA or an employee of a State agency that makes disability determinations for us. The adjudication officer may be located in our field offices or program service centers, in State agencies that make disability determinations for us, in OHA, or in our Regional Office of Program and Integrity Reviews.

Adjudication Officer Qualifications

The adjudication officer will be expected to bring relevant experience to the position, with additional training provided as may be necessary to complete the preparation of the individual to assume the full range of duties. The adjudication officer must have a thorough knowledge of the disability provisions, and be able to communicate effectively in informal conferences and in writing. The adjudication officer must be able to manage a substantial caseload, review independently the information in the claims file, determine the need for additional evidence, and evaluate the evidence under the applicable provisions of the Act, our regulations and rulings. In addition, the adjudication officer must be able to write factually and legally correct decisions that can be readily understood by the claimant.

Evaluation of Tests of Prehearing Procedures and Decisions by Adjudication Officers

These final rules establish the authority to test new prehearing procedures involving use of an adjudication officer. We plan to test the procedures in multiple sites, including our field offices and program service centers, State agencies that make disability determination for us, OHA, and our other regional offices to provide a means of determining the effect of the procedures in those sites. Each test will

involve a representative mix of geographic areas and caseloads. Before we commence each test, we will publish a notice in the **Federal Register** designating the test site(s) and duration of the test. The notice will also describe when the test will be conducted alone or in combination with one or more of the tests we are conducting pursuant to the final rules "Testing Modifications to the Disability Determination Procedures" which we published in the **Federal Register** on April 24, 1995 (60 FR 20023) (to be codified at 20 CFR 404.906 and 416.1406). We will evaluate test outcomes against the objectives of the disability redesign:

- Is the process user friendly?
- Does the process maintain a high level of payment quality?
- Does the process take less time?
- Is the process efficient?
- Does the process result in satisfying work for employees?

One of the most important aspects of our evaluation plan is to measure the effect the procedures used by the adjudication officer has on overall disability allowance rates. The responsibilities of an adjudication officer are not designed to change the overall allowance rates. In order to determine whether the actions taken by adjudication officers result in processing improvements consistent with expected outcomes, we will review evaluation results on a quarterly basis. If our evaluation shows that overall allowance rates increase or decrease unacceptably, we will cease use of, or make appropriate adjustments to the prehearing procedures, consistent with this regulatory authority.

In the preamble to the final rules on "Testing Modifications to the Disability Determination Procedures," we indicated that we plan to test the adjudication officer prehearing procedures, as well as other aspects of the disability redesign which do not require regulatory changes, in combination with one or more of the four models described in those final rules at some test sites. This continues to be our intention. Such tests will provide us with a body of information about each individual part of the redesign, as well as whether the combined effect of the redesign meets our goals of making the disability process user friendly, more timely and more accurate and efficient. It will also provide us with information about program expenditures in connection with the overall redesign.

Public Comments

These regulatory provisions were published in the **Federal Register** as an

NPRM on June 9, 1995 (60 FR 30482). We provided the public with a 30-day comment period. We received 21 letters in response to this notice from a variety of sources, including individuals employed by SSA as attorney advisors or ALJs, State agencies which make disability determinations for us, representatives of legal services organizations, union representatives, and a private attorney.

In general, the comments expressed concerns regarding several aspects of the proposed rule and requested that we not promulgate the rule as proposed. Some comments suggested changes to the rules, or identified provisions in the rule that the commenters believed required clarification. Some of the comments we received were outside the scope of the proposed rule, and therefore have not been addressed. The substantive comments made by the commenters and our responses are set out below. Because some of the comments were detailed, we condensed, summarized or paraphrased them. We have, however, tried to summarize the commenters's views accurately and respond to all of the significant issues raised by the commenters.

As discussed in our responses to the comments we received, we have made some changes to the proposed rule to clarify certain aspects of the rule. However, as most of the comments we received related to issues that we had considered previously in the development of the disability redesign plan, we are issuing these final rules with no substantive changes.

Comment: A number of commenters expressed concern that the proposed rule would change the responsibilities of claimants and their representatives for obtaining and submitting evidence.

Response: This is not our intent. Under the provisions of titles II and XVI of the Act and our existing regulations, a claimant will not be found disabled unless he or she submits evidence to support his or her claim for disability benefits or SSI payments based on disability. (See sections 223(d)(5)(A) and 1614(a)(3)(G) of the Act, and 20 CFR 404.704–404.705, 404.935, 404.1512, 404.1514, 416.912(c), and 416.1435). The claimant's responsibility regarding the submission of evidence to support the claim for benefits is equally the responsibility of a representative appointed by the claimant. (See 20 CFR 404.1710, 404.1715, 416.1510 and 416.1515).

The disability redesign plan reflects the principle of claimant and claimant representative responsibility in the submission of evidence while defining new procedures to promote effective

cooperation between SSA and claimants and their representatives in ensuring the development of complete evidentiary records. The plan makes the best use of a representative's services early in the process, and these final rules do not impose on claimants or their representatives significant responsibilities that they do not currently have.

Testing use of an adjudication officer as part of the prehearing procedures we follow will allow us to assess the extent to which having an adjudication officer work with claimants and representatives in developing complete evidentiary records will contribute to improved and more expeditious claims development and, thereby, a more effective adjudication process.

Comment: Several commenters stated that the proposed rule would result in different treatment of represented and unrepresented claimants and encourage representation. Other commenters thought the proposed rule would discourage representation.

Response: Like the proposed rule, these final rules contain slightly different procedures in two areas—the development of additional evidence and the holding of prehearing conferences. These differences in procedures result from a claimant's decision to proceed without representation. We believe that the differences in procedures are warranted in both instances and that these final rules will not result in unfair treatment of any claimants. The procedures reflected in these final rules also involve a continuance of existing practices in our hearing offices.

Our intent is neither to encourage nor discourage representation. Rather, under these final rules, and as contemplated by the disability redesign plan, we will remind the claimant of his or her right to representation. The information regarding the right to representation provided by the adjudication officer is designed to prevent delays caused by a lack of understanding of that right and to encourage the claimant to decide about the need for representation and choice of representative as soon as practicable. In all cases, however, the adjudication officer retains his responsibility to ensure complete evidentiary development with the claimant and any appointed representative and will work with the claimant and/or the representative in developing evidence. The adjudication officer will assist unrepresented claimants and, if necessary, claimant representatives in securing evidence. Generally, unrepresented claimants will more frequently need assistance than represented claimants. However, all

claimants will be treated fairly and will be assisted if necessary in meeting their obligations to produce evidence. That approach continues current practices under which ALJs exercise a heightened responsibility in assisting unrepresented claimants.

The adjudication officer and the claimant's representative will participate in an informal conference. One of the purposes of this informal conference is to attempt to reach proposed agreements for the approval of the ALJ regarding the issues which are not in dispute and those issues proposed for the hearing. However, the adjudication officer may conduct an informal conference with an unrepresented claimant, the main purpose of which will be to explain to the claimant the issues which may arise at the hearing. In addition, if a claimant obtains representation after the adjudication officer has concluded that the case is ready for a hearing, the ALJ will return the case for an informal conference with the adjudication officer. Under current practice, personnel in our OHA hearing offices generally do not request unrepresented claimants to participate in prehearing conferences, and prehearing conferences are sometimes scheduled after a claimant who was unrepresented obtains representation. The final rules do not contain specific criteria regarding when an adjudication officer will hold an informal conference with an unrepresented claimant so that the adjudication officer will have some discretion in this area.

An essential function of the adjudication officer is to provide a point of contact for unrepresented claimants in order to explain the hearing process and the right to representation. The adjudication officer also will give unrepresented claimants referral sources for obtaining representation and copies of documents needed in appointing a representative. Under current practice, personnel in our OHA hearing offices remind claimants about their right to representation and provide information about referral sources in acknowledging requests for a hearing. The purpose of those actions, like the similar actions to be taken by the adjudication officers, is to encourage prompt and fully informed decisions about securing representation. There is no attempt on our part to encourage or discourage representation. Under the redesigned process, as under the current process, the decision to proceed with or without representation will continue to be a decision for the claimant to make.

Comment: Some commenters thought that the proposed rule would create a

new step in the administrative review process, would reduce claimant access to an ALJ, and delay the adjudication of claims.

Response: An overriding purpose of the disability redesign plan is to shorten and expedite the administrative process. To reach that goal, the plan contemplates eventual elimination of the reconsideration step and the creation of the adjudication officer position. Use of an adjudication officer is not intended to serve as a replacement for reconsideration, as some commenters thought. Instead, the disability redesign plan contemplates the elimination of reconsideration because the initial determination will be the result of a process that ensures a more fully developed evidentiary record and provides an opportunity for the claimant to present additional evidence at a predecision interview. When a claimant is dissatisfied with the initial determination and requests an ALJ hearing, the adjudication officer's role will be to expedite the completion of any necessary prehearing activities and to issue, where warranted by the evidence, a decision which is wholly favorable to the claimant without the need for a hearing.

Under these final rules, adjudication officers will not have authority to deny claims or to dismiss requests for an ALJ hearing. The intent of the redesign plan, and these final rules, is to increase claimant access to the ALJ by reducing the time required to receive an ALJ hearing in cases in which a hearing is necessary. Moreover, these final rules preserve a claimant's right to a hearing which will be conducted by an ALJ, if he or she is dissatisfied with the adjudication officer's decision.

Comment: Other commenters expressed concern that the proposed rule would force ALJs to hear cases that are improperly developed. These commenters stated that the ALJ's authority to consider additional evidence or issues should be clarified.

Response: We do not agree with the commenters' concerns that these rules would force ALJs to hear and decide improperly developed cases. Sections 404.943(b)(4) and 416.1443(b)(4) of the proposed rule stated that at the point at which a case is referred for a hearing, "the administrative law judge conducts all further hearing proceedings, including scheduling and holding a hearing and issuing a decision or dismissal of your request for a hearing." New §§ 404.943 and 416.1443 do not deny to an ALJ any authority he or she may exercise under existing regulations. In order to make this point clearer, however, we have clarified in these final

rules that the proceeding an ALJ may conduct can include the development of additional evidence.

Comment: Several commenters stated that the provision of the proposed rule providing that the case would be returned to the adjudication officer if the claimant obtained representation after the AO concluded that the case was ready for a hearing, would create delays and discourage representation.

Response: We do not agree with the commenters, and it is certainly not our intent to create delays or to discourage representation. We believe that this procedure will enable us to interact with the claimant's representative in a better and more timely manner and that the AO, working with the claimant's representative, will be able to ensure that the evidentiary record is as complete as possible prior to the hearing. By ensuring the development of a complete record before the hearing, we intend that this procedure will expedite both the hearing and the issuance of a hearing decision.

Comment: A number of commenters thought that the proposed rule was purposely vague or unclear on how certain issues will be handled in the process, e.g., the return of cases by an ALJ to an adjudication officer and whether and how new evidence and issues could be considered by an ALJ.

Response: As noted above and in the NPRM (60 FR 30482, 30483), new §§ 404.943 and 416.1443 establish authority to test having an adjudication officer be the focal point of prehearing activities, as described in the disability redesign plan. The redesign plan set forth a broad description of a new disability process and of the adjudication officer position and left operational, organizational and other details of the process to be developed (59 FR 18188). Our intent is not to be vague or unclear; rather, our intent is to authorize testing in which detailed operating procedures may be addressed and developed incrementally. As noted above, however, we have clarified in these final rules that the ALJ may consider additional evidence, and is not limited to the record developed by the claimant, his or her representative and the adjudication officer. We also have clarified that the written agreements prepared by the adjudication officer with the claimant's representative are only proposed agreements for the approval of the ALJ. These agreements are subject to acceptance by and/or further development by the ALJ at the hearing. In addition, we have clarified that the ALJ may return the case to the adjudication officer for further development or to obtain additional

evidence at any point on or before the date of the hearing.

Comment: Several commenters objected to a perceived acceleration of the implementation of the adjudication officer, particularly before other parts of the disability redesign were in place, including the disability claims manager position called for in the disability redesign plan.

Response: These final rules establish authority to test the use of an adjudication officer; they do not establish the authority to implement the use of the adjudication officer position on a nationwide basis. The purpose of the rules is to test the use of an adjudication officer position and its procedures in a variety of sites and circumstances. We will test the position alone and in combination with one or more of the tests we are conducting pursuant to the final rules we recently published on "Testing Modifications to the Disability Determination Procedures" (60 FR 20023). The modifications to be tested under those rules include the position of disability claims manager and elimination of the reconsideration level of the existing disability claims process.

Comment: Two commenters expressed the view that DDS employees are best suited for the adjudication officer position; five other commenters stated that the adjudication officer should be an attorney or have legal training.

Response: Comments regarding the qualifications of the adjudication officer, throughout the planning process as well as in response to the NPRM, essentially have fallen into the two categories reflected above. The Commissioner has made a decision that for testing purposes the adjudication officer may be an employee of SSA or a State agency that makes disability determinations for us. The adjudication officer will be expected to bring relevant experience to the position. While legal experience is deemed desirable, it is not required, provided the individual is qualified to communicate effectively in informal conferences and in writing. The issues regarding whether the adjudication officer must have the qualifications for an attorney position are issues upon which testing information is required.

Comment: Two commenters expressed the view that the adjudication officer should be located in OHA offices only.

Response: We have not adopted this comment. We believe the testing of the adjudication officer position should not be limited to OHA sites. Testing the position in a variety of sites will provide

information on the most effective location(s) for the adjudication officers. We also wish to assess the feasibility of increasing accessibility to claimants and their representatives by locating the adjudication officers in community based sites.

Comment: Some of the commenters thought the proposed rule would violate a claimant's right to due process under the Constitution and a full and fair hearing under the Act if the rule precluded the ALJ from considering new evidence or issues at the hearing.

Response: We do not agree that these rules violate a claimant's right to due process under the Constitution or a full and fair hearing under the Act in any way. These final rules do not preclude or interfere with a claimant's right to a full and fair hearing before an ALJ. Rather, the claimant's right to a hearing conducted by an ALJ is explicitly preserved even in instances in which the adjudication officer makes a wholly favorable decision. The preservation of the claimant's right to an ALJ hearing is consistent with due process and equal protection under the Constitution. Moreover, the due process concerns expressed by the commenters were premised on the commenters' belief that the proposed rule limited the ALJ's ability to consider additional evidence or issues at the hearing. As we have discussed above and clarified in these final rules, the ALJ's ability to consider additional evidence or issues under these final rules remains the same as it is under our current regulations.

Comment: A number of commenters expressed the view that the adjudication officer is unnecessary because of the availability of preferable alternatives, specifically the short-term disability initiatives we are currently undertaking. Other commenters requested that we clarify the relationship between the adjudication officer and the attorney advisors in OHA who have been temporarily authorized to make fully favorable decisions in certain instances pursuant to the short-term disability initiatives.

Response: The adjudication officer is part of SSA's long term plans for redesigning and fundamentally improving the disability claim process. Our short-term initiatives are designed to process pending workloads more efficiently, not to bring about the kind of changes that will fundamentally improve the disability claim process.

The short-term disability initiatives include final rules issued on June 30, 1995 (60 FR 34126) which temporarily authorize attorney advisors in OHA to conduct certain prehearing proceedings and, where appropriate based on the

documentary record developed as a result of these proceedings, to issue decisions that are wholly favorable to the parties to the hearing. Although there are similarities in functions under this short-term initiative and the adjudication officer process, there are substantial differences as well. The primary focus of the attorney advisor process is on the rapid identification of pending cases in which a wholly favorable decision can be made without a hearing. The adjudication officer also will identify claims in which a wholly favorable decision may be made, but the adjudication officer's functions are more broadly concerned with the full range of prehearing activities, particularly development of the record.

Comment: A few commenters expressed concern that the proposed rule provided no study protocol.

Response: We will have a study and evaluation plan in place to assure a valid and accurate assessment of the degree to which use of an adjudication officer attains the goals we wish to achieve before any national implementation of the process. The approach we are following in this regard is similar to the approach we are following in the related testing to be conducted under final rules on "Testing Modifications to the Disability Determination Procedures" (60 FR 20023, 20025).

Comment: Some commenters expressed concern that the proposed rule provided no clearly defined decision-making standard.

Response: Adjudication officers will be bound by the Social Security Act, the regulations, and Social Security Rulings, including Social Security Acquiescence Rulings. They will also rely on other guidance published by the agency. This is consistent with established standards of decision making in SSA.

Comment: Other commenters expressed concern that the proposed rule provided no specific quality assurance review procedures.

Response: We are establishing an intensive quality assurance review program that will provide us with information regarding the quality of the adjudication officer work process, as well as the procedures, sites and the assumptions set out in detail in the disability redesign plan. In addition, the final rules authorize the Appeals Council to review the adjudication officer's decision on its own motion. No additional changes in these final rules or existing regulations are required to allow us to subject the decisions made by adjudication officers to quality assurance review procedures.

Comment: Several commenters expressed concerns that the adjudication officer position as proposed for testing violated Federal/State principles applicable in the administration of the Social Security disability programs, including the principle that States cannot make decisions.

Response: We are of the opinion that sections 205(b)(1) and 221(a)(1) of the Act give the Commissioner, or her agents, broad authority to determine rights to benefits under the Act. These sections contain no language specifically excluding State DDS employees who adjudicate disability claims for us from acting as agents of the Commissioner in this regard. Moreover, having DDS employees as adjudication officers is consistent with SSA's current regulations at 20 CFR 404.1613 and 416.1013 governing Federal and State jurisdiction with respect to disability determination workloads and adding new classes of cases and decision-makers.

Comment: Some commenters also expressed concern that the adjudication officer process would require Federal oversight of decisions made by employees of State agencies.

Response: The Social Security disability programs under titles II and XVI of the Act establish a Federal program which includes a role for the States in the adjudication process. As in all other areas of the disability programs, the adjudication officer will be subject to SSA oversight, both in effectuating the adjudication officer's wholly favorable decisions and in quality assurance functions.

Comment: Several commenters expressed the view that the adjudication officer process will increase administrative and program costs, particularly on the basis that the process will not decrease OHA workloads unless it results in the allowance of many cases.

Response: We are conducting these tests to determine whether use of an adjudication officer will have an effect on program and administrative expenditures. The adjudication officer's function is to provide a focal point for all prehearing activities. While adjudication officers may issue wholly favorable decisions where warranted, they can contribute to the improvement of the disability process in other ways as well. Use of an adjudication officer is not designed to change the overall allowance rates. Moreover, as set out in the NPRM and above, in order to determine whether the prehearing procedures result in processing improvements consistent with expected

outcomes, we will review evaluation results on a quarterly basis and make appropriate adjustments to, or cease use of, the prehearing procedures consistent with this regulatory authority if there is evidence that overall allowance rates increase or decrease unacceptably.

Comment: One commenter suggested changes to the proposed rules to clarify in several places in the regulations that adjudication officers may only issue wholly favorable decisions.

Response: We believe these final rules clearly limit the adjudication officers to making wholly favorable decisions, and do not require further clarification as suggested by the commenter.

Comment: Two commenters expressed the view that the 30-day comment period was too short.

Response: We do not agree that a longer comment period was warranted. We provided a shorter comment period than the 60-day period we usually provide because of the salutary effect we expect these rules to have on our ability to improve our service to claimants, and the importance we place on ensuring that we adjudicate claims timely and accurately. We also believe that the 30-day period is appropriate in this instance because we previously provided the public an extended opportunity to comment on all aspects of the disability redesign plan, including the establishment of the adjudication officer position.

Comment: One commenter suggested that we add a sentence in § 404.943(b)(1) to clarify that a claimant's representative will be allowed to participate in the interview with the claimant.

Response: We have not adopted this comment because the final rules we are issuing provide authority for us to test the use of an adjudication officer. They do not change in any way the rules we follow regarding representation. Our existing regulations at 20 CFR 404.1705 and 416.1505 provide that claimants may obtain representation at any time. We notify the claimant's representative of any administrative actions we take, and we also afford the representative the opportunity to participate in any meetings or interviews which we conduct with the claimant he or she represents.

Comment: We were also asked by a commenter to clarify in § 404.943(a)(2) of the regulations that some persons would be assigned to a control group for purposes of the tests we will conduct under these final rules.

Response: Although we will have a control group, cases in this group will be processed in accordance with our current regulations, and the control

group will be used to provide comparative data when we evaluate the records of cases that were used in our tests. For these reasons, a specific reference to the control group procedures is not needed in these final rules, and the change suggested by the commenter has not been made.

Comment: Two commenters asked us to clarify whether the adjudication officer would schedule a date for the hearing with an ALJ.

Response: The answer to this question is no. These final rules do not change our current procedures under which the ALJ schedules the hearing. However, we will use two new methods in conjunction with the tests we will conduct under these final rules to facilitate the ability of the ALJ to schedule a hearing. Under the first method, before the prehearing procedures are completed, the adjudication officer will ask the claimant or the claimant's representative to provide two or three dates within the following 35–50 days on which the claimant and his or her representative could be available for a hearing. These dates will be part of the record the adjudication officer forwards to the hearing office, where the case will be reviewed and a hearing scheduled for one of the dates in the file. The second method which we intend to test is one where the adjudication officer will arrange the time and date for the hearing by having the adjudication officer match a time acceptable to the claimant and his or her representative with an available hearing time out of a block of times for a hearing provided by the hearing office. The block of times will be the time periods within the following 2 to 3 months when time is available to hold hearings. The adjudication officer, however, will not access individual ALJ scheduling calendars and will not schedule a case with a specific ALJ. Under either procedure, the hearing office will prepare and send out the hearing notice 20 days prior to the hearing. The objective of both methods is to ensure that the hearing is scheduled and held in a timely and efficient manner following the conclusion of the prehearing procedures.

Comment: One commenter requested that the provision in § 404.943(c)(1) be revised to clarify the authority of the adjudication officer to issue a decision after a claim has been referred to an ALJ, but before the hearing is held.

Response: We have revised §§ 404.943(b)(4) and 416.1443(b)(4) to clarify that an ALJ may return a claim to the adjudication officer for further development prior to the hearing. Under

the final rules, the ALJ may return the claim to the adjudication officer on or before the date of the hearing to complete the development of the evidence and for such other action as necessary. If the ALJ exercises this authority, the adjudication officer may make a decision that is wholly favorable to the claimant if it is warranted by the evidence, or the adjudication officer may refer the claim to the ALJ when the additional prehearing procedures are completed.

Comment: One commenter requested us to clarify that, when the claimant or representative is unable to agree with the adjudication officer that the development of the evidence is complete, the adjudication officer will note the disagreement and refer the claim to the administrative law judge for further proceedings.

Response: We agree with the comment and have clarified §§ 404.943(b)(4) and 416.1443(b)(4).

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these final rules meet the criteria for a significant regulatory action under Executive Order 12866. Thus, they were subject to OMB review. These rules do not adversely affect State, local or tribal governments. The administrative costs of the tests will be covered within budgeted resources. No program costs are expected to result from processing of the test cases. We have not, therefore, prepared a cost/benefit analysis under Executive Order 12866.

Regulatory Flexibility Act

We certify that these regulations will not have a significant economic impact on a substantial number of small entities because they affect only individuals. Therefore, a regulatory flexibility analysis as provided in Public Law 96-354, the Regulatory Flexibility Act, is not required.

Paperwork Reduction Act

These regulations impose no new reporting or record keeping requirements requiring OMB clearance.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security-Disability Insurance; 96.006, Supplemental Security Income)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Death benefits, Disability benefits, Old-Age, Survivors and

Disability Insurance, Reporting and recordkeeping requirements, Social security.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Supplemental Security Income (SSI), Reporting and recordkeeping requirements.

Dated: August 23, 1995.

Shirley Chater,

Commissioner of Social Security.

For the reasons set out in the preamble, subpart J of part 404 and subpart N of part 416 of chapter III of title 20 of the Code of Federal Regulations are amended as set forth below.

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950—)

Subpart J—[Amended]

1. The authority citation for subpart J of part 404 continues to read as follows:

Authority: Secs. 201(j), 205 (a), (b), and (d)–(h), 221(d), 225 and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 405 (a), (b), and (d)–(h), 421(d), 425 and 902(a)(5); 31 U.S.C. 3720A).

2. New § 404.943 is added under the undesignated center heading “Hearing Before an Administrative Law Judge” to read as follows:

§ 404.943 Responsibilities of the adjudication officer.

(a)(1) *General.* Under the procedures set out in this section we will test modifications to the procedures we follow when you file a request for a hearing before an administrative law judge in connection with a claim for benefits based on disability where the question of whether you are under a disability as defined in § 404.1505 is at issue. These modifications will enable us to test the effect of having an adjudication officer be your primary point of contact after you file a hearing request and before you have a hearing with an administrative law judge. The tests may be conducted alone, or in combination with the tests of the modifications to the disability determination procedures which we conduct under § 404.906. The adjudication officer, working with you and your representative, if any, will identify issues in dispute, develop evidence, conduct informal conferences, and conduct any other prehearing proceeding as may be necessary. The adjudication officer has the authority to make a decision wholly favorable to you

if the evidence so warrants. If the adjudication officer does not make a decision on your claim, your hearing request will be assigned to an administrative law judge for further proceedings.

(2) *Procedures for cases included in the tests.* Prior to commencing tests of the adjudication officer position in selected site(s), we will publish a notice in the **Federal Register**. The notice will describe where the specific test site(s) will be and the duration of the test(s). We will also state whether the tests of the adjudication officer position in each site will be conducted alone, or in combination with the tests of the modifications to the disability determination procedures which we conduct under § 404.906. The individuals who participate in the test(s) will be assigned randomly to a test group in each site where the tests are conducted.

(b)(1) *Prehearing procedures conducted by an Adjudication Officer.* When you file a request for a hearing before an administrative law judge in connection with a claim for benefits based on disability where the question of whether you are under a disability as defined in § 404.1505 is at issue, the adjudication officer will conduct an interview with you. The interview may take place in person, by telephone, or by videoconference, as the adjudication officer determines is appropriate under the circumstances of your case. If you file a request for an extension of time to request a hearing in accordance with § 404.933(c), the adjudication officer may develop information on, and may decide where the adjudication officer issues a wholly favorable decision to you that you had good cause for missing the deadline for requesting a hearing. To determine whether you had good cause for missing the deadline, the adjudication officer will use the standards contained in § 404.911.

(2) *Representation.* The adjudication officer will provide you with information regarding the hearing process, including your right to representation. As may be appropriate, the adjudication officer will provide you with referral sources for representation, and give you copies of necessary documents to facilitate the appointment of a representative. If you have a representative, the adjudication officer will conduct an informal conference with the representative, in person or by telephone, to identify the issues in dispute and prepare proposed written agreements for the approval of the administrative law judge regarding those issues which are not in dispute and those issues proposed for the

hearing. If you decide to proceed without representation, the adjudication officer may hold an informal conference with you. If you obtain representation after the adjudication officer has concluded that your case is ready for a hearing, the administrative law judge will return your case to the adjudication officer who will conduct an informal conference with you and your representative.

(3) *Evidence.* You, or your representative, may submit, or may be asked to obtain and submit, additional evidence to the adjudication officer. As the adjudication officer determines is appropriate under the circumstances of your case, the adjudication officer may refer the claim for further medical or vocational evidence.

(4) *Referral for a hearing.* The adjudication officer will refer the claim to the administrative law judge for further proceedings when the development of evidence is complete, and you or your representative agree that a hearing is ready to be held. If you or your representative are unable to agree with the adjudication officer that the development of evidence is complete, the adjudication officer will note your disagreement and refer the claim to the administrative law judge for further proceedings. At this point, the administrative law judge conducts all further hearing proceedings, including scheduling and holding a hearing (§ 404.936), considering any additional evidence or arguments submitted (§§ 404.935, 404.944, 404.949, 404.950), and issuing a decision or dismissal of your request for a hearing, as may be appropriate (§§ 404.948, 404.953, 404.957). In addition, if the administrative law judge determines on or before the date of your hearing that the development of evidence is not complete, the administrative law judge may return the claim to the adjudication officer to complete the development of the evidence and for such other action as necessary.

(c)(1) *Wholly favorable decisions issued by an adjudication officer.* If, after a hearing is requested but before it is held, the adjudication officer decides that the evidence in your case warrants a decision which is wholly favorable to you, the adjudication officer may issue such a decision. For purposes of the tests authorized under this section, the adjudication officer's decision shall be considered to be a decision as defined in § 404.901. If the adjudication officer issues a decision under this section, it will be in writing and will give the findings of fact and the reasons for the decision. The adjudication officer will evaluate the issues relevant to

determining whether or not you are disabled in accordance with the provisions of the Social Security Act, the rules in this part and part 422 of this chapter and applicable Social Security Rulings. For cases in which the adjudication officer issues a decision, he or she may determine your residual functional capacity in the same manner that an administrative law judge is authorized to do so in § 404.1546. The adjudication officer may also evaluate the severity of your mental impairments in the same manner that an administrative law judge is authorized to do so under § 404.1520a. The adjudication officer's decision will be based on the evidence which is included in the record and, subject to paragraph (c)(2) of this section, will complete the actions that will be taken on your request for hearing. A copy of the decision will be mailed to all parties at their last known address. We will tell you in the notice that the administrative law judge will not hold a hearing unless a party to the hearing requests that the hearing proceed. A request to proceed with the hearing must be made in writing within 30 days after the date the notice of the decision of the adjudication officer is mailed.

(2) *Effect of a decision by an adjudication officer.* A decision by an adjudication officer which is wholly favorable to you under this section, and notification thereof, completes the administrative action on your request for hearing and is binding on all parties to the hearing and not subject to further review, unless—

(i) You or another party requests that the hearing continue, as provided in paragraph (c)(1) of this section;

(ii) The Appeals Council decides to review the decision on its own motion under the authority provided in § 404.969;

(iii) The decision is revised under the procedures explained in §§ 404.987 through 404.989; or

(iv) In a case remanded by a Federal court, the Appeals Council assumes jurisdiction under the procedures in § 404.984.

(3) *Fee for a representative's services.* The adjudication officer may authorize a fee for your representative's services if the adjudication officer makes a decision on your claim that is wholly favorable to you, and you are represented. The actions of, and any fee authorization made by, the adjudication officer with respect to representation will be made in accordance with the provisions of subpart R of this part.

(d) *Who may be an adjudication officer.* The adjudication officer described in this section may be an

employee of the Social Security Administration or a State agency that makes disability determinations for us.

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

1. The authority citation for subpart N continues to read as follows:

Authority: Sec. 702(a)(5), 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1383, and 1383b).

2. New § 416.1443 is added under the undesignated center heading "Hearing Before an Administrative Law Judge" to read as follows:

§ 416.1443 Responsibilities of the adjudication officer.

(a)(1) *General.* Under the procedures set out in this section we will test modifications to the procedures we follow when you file a request for a hearing before an administrative law judge in connection with a claim for benefits based on disability where the question of whether you are under a disability as defined in §§ 416.905 and 416.906 is at issue. These modifications will enable us to test the effect of having an adjudication officer be your primary point of contact after you file a hearing request and before you have a hearing with an administrative law judge. The tests may be conducted alone, or in combination with the tests of the modifications to the disability determination procedures which we conduct under § 416.1406. The adjudication officer, working with you and your representative, if any, will identify issues in dispute, develop evidence, conduct informal conferences, and conduct any other prehearing proceeding as may be necessary. The adjudication officer has the authority to make a decision wholly favorable to you if the evidence so warrants. If the adjudication officer does not make a decision on your claim, your hearing request will be assigned to an administrative law judge for further proceedings.

(2) *Procedures for cases included in the tests.* Prior to commencing tests of the adjudication officer position in selected site(s), we will publish a notice in the **Federal Register**. The notice will describe where the specific test site(s) will be and the duration of the test(s). We will also state whether the tests of the adjudication officer position in each site will be conducted alone, or in combination with the tests of the modifications to the disability determination procedures which we conduct under § 416.1406. The individuals who participate in the

test(s) will be assigned randomly to a test group in each site where the tests are conducted.

(b)(1) *Prehearing procedures conducted by an Adjudication Officer.* When you file a request for a hearing before an administrative law judge in connection with a claim for benefits based on disability where the question of whether you are under a disability as defined in §§ 416.905 and 416.906 is at issue, the adjudication officer will conduct an interview with you. The interview may take place in person, by telephone, or by videoconference, as the adjudication officer determines is appropriate under the circumstances of your case. If you file a request for an extension of time to request a hearing in accordance with § 416.1433(c), the adjudication officer may develop information on, and may decide where the adjudication officer issues a wholly favorable decision to you that you had good cause for missing the deadline for requesting a hearing. To determine whether you had good cause for missing the deadline, the adjudication officer will use the standards contained in § 416.1411.

(2) *Representation.* The adjudication officer will provide you with information regarding the hearing process, including your right to representation. As may be appropriate, the adjudication officer will provide you with referral sources for representation, and give you copies of necessary documents to facilitate the appointment of a representative. If you have a representative, the adjudication officer will conduct an informal conference with the representative, in person or by telephone, to identify the issues in dispute and prepare proposed written agreements for the approval of the administrative law judge regarding those issues which are not in dispute and those issues proposed for the hearing. If you decide to proceed without representation, the adjudication officer may hold an informal conference with you. If you obtain representation after the adjudication officer has concluded that your case is ready for a hearing, the administrative law judge will return your case to the adjudication officer who will conduct an informal conference with you and your representative.

(3) *Evidence.* You, or your representative, may submit, or may be asked to obtain and submit, additional evidence to the adjudication officer. As the adjudication officer determines is appropriate under the circumstances of your case, the adjudication officer may refer the claim for further medical or vocational evidence.

(4) *Referral for a hearing.* The adjudication officer will refer the claim to the administrative law judge for further proceedings when the development of evidence is complete, and you or your representative agree that a hearing is ready to be held. If you or your representative are unable to agree with the adjudication officer that the development of evidence is complete, the adjudication officer will note your disagreement and refer the claim to the administrative law judge for further proceedings. At this point, the administrative law judge conducts all further hearing proceedings, including scheduling and holding a hearing, (§ 416.1436), considering any additional evidence or arguments submitted (§§ 416.1435, 416.1444, 416.1449, 416.1450), and issuing a decision or dismissal of your request for a hearing, as may be appropriate (§§ 416.1448, 416.1453, 416.1457). In addition, if the administrative law judge determines on or before the date of your hearing that the development of evidence is not complete, the administrative law judge may return the claim to the adjudication officer to complete the development of the evidence and for such other action as necessary.

(c)(1) *Wholly favorable decisions issued by an adjudication officer.* If, after a hearing is requested but before it is held, the adjudication officer decides that the evidence in your case warrants a decision which is wholly favorable to you, the adjudication officer may issue such a decision. For purposes of the tests authorized under this section, the adjudication officer's decision shall be considered to be a decision as defined in § 416.1401. If the adjudication officer issues a decision under this section, it will be in writing and will give the findings of fact and the reasons for the decision. The adjudication officer will evaluate the issues relevant to determining whether or not you are disabled in accordance with the provisions of the Social Security Act, the rules in this part and part 422 of this chapter and applicable Social Security Rulings. For cases in which the adjudication officer issues a decision, he or she may determine your residual functional capacity in the same manner that an administrative law judge is authorized to do so in § 416.946. The adjudication officer may also evaluate the severity of your mental impairments in the same manner that an administrative law judge is authorized to do so under § 416.920a. The adjudication officer's decision will be based on the evidence which is included in the record and, subject to

paragraph (c)(2) of this section, will complete the actions that will be taken on your request for hearing. A copy of the decision will be mailed to all parties at their last known address. We will tell you in the notice that the administrative law judge will not hold a hearing unless a party to the hearing requests that the hearing proceed. A request to proceed with the hearing must be made in writing within 30 days after the date the notice of the decision of the adjudication officer is mailed.

(2) *Effect of a decision by an adjudication officer.* A decision by an adjudication officer which is wholly favorable to you under this section, and notification thereof, completes the administrative action on your request for hearing and is binding on all parties to the hearing and not subject to further review, unless—

(i) You or another party requests that the hearing continue, as provided in paragraph (c)(1) of this section;

(ii) The Appeals Council decides to review the decision on its own motion under the authority provided in § 416.1469;

(iii) The decision is revised under the procedures explained in §§ 416.1487 through 416.1489; or

(iv) In a case remanded by a Federal court, the Appeals Council assumes jurisdiction under the procedures in § 416.1484.

(3) *Fee for a representative's services.* The adjudication officer may authorize a fee for your representative's services if the adjudication officer makes a decision on your claim that is wholly favorable to you, and you are represented. The actions of, and any fee authorization made by, the adjudication officer with respect to representation will be made in accordance with the provisions of subpart O of this part.

(d) *Who may be an adjudication officer.* The adjudication officer described in this section may be an employee of the Social Security Administration or a State agency that makes disability determinations for us.

[FR Doc. 95-22579 Filed 9-12-95; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 19

Duty to Report Violations; Amendment

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.